# UNIFORMITY OF LAW IN THE SEVERAL STATES AS AN AMERICAN IDEAL.

## I. — CASE LAW.

THE accumulation of case law and statutes in the United States has reached such proportions that it demands serious attention from all who are engaged in the study or the administration of the law. The Supreme Court of the United States and the courts of last resort in each of the forty-six states are producing annually volumes of new decisions which are binding precedents upon all inferior courts within their respective jurisdictions. In addition the national legislature and the legislature of each state are holding annual or biennial sessions and enacting new laws.[1] Every year it is becoming more difficult for lawyers and judges to keep up with the law. Judicial opinions written upon the plan often followed by Mr. Justice Gray, which were designed to exhibit the entire course of decision upon the subject in hand down to the date of the opinion, and of which conspicuous examples may be seen in Hill *v.* Boston,[2] Ross *v.* Ross,[3] and Hilton *v.* Guyot,[4] are becoming a sheer impossibility. As the precedents increase in number the judges of the highest courts under the pressure of business find it more and more difficult to examine carefully and cite the decisions of other jurisdictions. Whether the citation of outside authority has in fact diminished is a question which it would require much labor to answer with confidence, and upon which, in the absence of wide investigation, there is room for difference of opinion.[5] The rapid increase of cases also presses hard upon the legal profession. A lawyer in full practice now finds it more and more dangerous to advise upon the law of any jurisdiction except his own. Teachers of law in the several states are perplexed by the multitude of pre-

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[1] Alabama is the sole exception, the sessions of the legislature being quadrennial in that state.

[2] 122 Mass. 344.

[3] 129 Mass. 243.

[4] 159 U. S. 113.

[5] See Report of the Committee on Law Reporting, 18 Rep. Am. Bar Ass'n, 343, and the valuable table annexed. Also see 2 Ill. L. Rev. 186, a note by Professor Roscoe Pound, and 21 HARV. L. REV. 119, note by Professor Wambaugh.

cedents and diversity of rules in deciding what is the proper course of study to lay before their students.[1]

It is worthy of note that a similar condition exists in the British Empire. Professor Maitland said: "Standing at the beginning of a century and in the first year of Edward VII, thinking of the wide lands which call him king, thinking of our complex and loosely-knit British Commonwealth, we cannot look into the future without misgivings. If unity of law — such unity as there has been — disappears, much else that we treasure will disappear also, and (to speak frankly) unity of law is precarious. . . . The so-called common law of one colony will swerve from that of another, and both from that of England. Some colonies will have codes. If English lawyers do not read Australian reports (and they cannot read everything), Australian lawyers will not much longer read English reports."[2] Sir Edward Coke in the preface to the Third Part of his Reports estimated the number of volumes of Reports then in existence at fifteen.[3] Lord Campbell says of Bayley, J., who flourished under George the Fourth, that "the whole common law of this realm he carried in his head, and in seven little red books. These accompanied him day and night, in these every reported case was regularly pasted, and in these, by a sort of magic, he could at all times instantaneously turn up the authorities required."[4] The reported decisions of the Supreme Court of the United States and of the highest courts of Pennsylvania and Illinois each exceed two hundred volumes in number. The regular reports of the decisions of the highest court of New York have reached one hundred and ninety volumes, and those of the Supreme Judicial Court of Massachusetts one hundred and ninety-three volumes. No individual, however industrious or gifted, can hope to master more than a small part of this mass of matter, to say nothing of the statutes.

The language used by Sir Henry Maine in 1856, which then might have seemed exaggerated, is now well supported by the facts: "Hence that frightful accumulation of case law which conveys to English jurisprudence a menace of revolution far more serious than any popular murmurs, and which, if it does nothing

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[1] See the interesting essay of Professor Kales, 21 HARV. L. REV. 92.

[2] English Law and the Renaissance, 33-34. Reprinted in 1 Select Essays in Anglo-Am. Legal History, 168.

[3] Pollock, First Book of Jurisp., 294.

[4] 3 Lives of Chief Justices, 291. See also Foss, 9 Judges of England, 76.

else, is giving to mere tenacity of memory a disgraceful advantage over all the finer qualities of the legal intellect." [1]

As is well known, the entire body of our private law, so far as it has been stated, is in the form of case law and statute law. The entire body of our common law and equity, so far as it has been stated, is in the form of cases. In this paper it is proposed to consider the best method of avoiding the dangers arising from the accumulation of case law. Mr. Justice Holmes has assured us that "it is a great mistake to be frightened by the ever increasing number of the reports." He says: "The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view." [2] This profound observation may sometime be the basis of a practical reform, but any measure aiming to deprive old precedents of their binding quality would meet with strong and deserved opposition from the legal profession and from legal scholars who have awakened a spirit of historical investigation now at work upon the law, and would have little chance of success. So long as the old cases remain binding as precedents, they will be sought out and cited, and must be carried forward from age to age as a living portion of the law.

Thus far no systematic official or legislative action has been adopted to abate the evil of increasing precedents. The American Bar Association has repeatedly discussed the subject and obtained reports from able committees; but no scheme of relief has been framed.[3] Unrestricted publication of reports of adjudged cases seems to be demanded. In some of the states and in the United States Supreme Court a number of cases had not been reported, but the pressure of the bar has been such that those cases are now regularly inserted as memoranda in the reports. This practice was begun in New York in 1871, on the coming in of a new state reporter, Mr. Sickels, who explains the reason for his action.[4] A similar practice exists in other states.[5] The bar seems to feel instinctively that the strength of the case law comes largely from the fact that judges have given their reasons publicly for their

[1] Cambridge Essays, 1856, I, 10.

[2] The Path of the Law, 10 HARV. L. REV. 457, 458.

[3] See 18 Rep. Am. Bar Ass'n, 28, 343. See also 21 *ibid.* 16, 437; 26 *ibid.* 437; 27 *ibid.* 450; Dill., Laws and Jurisp. of England and America, 289–90.

[4] See 46 N. Y. (1 Sickels) III.

[5] 63 Cal. (1883); 163 U. S. (1895); 21 Rep. Am. Bar Ass'n, 444, as to unreported "conclusions" in New Jersey.

decisions. Every man may read for himself the grounds upon which his case was decided, and the entire legal profession can see and judge the quality of the work. Without weakening this main pillar of the judicial system and of the common law, much may be done by the highest courts, in the exercise of their discretion, to shorten reports by filing mere resolutions or conclusions in cases requiring no extended reasoning. This would apply to all cases which contribute nothing to the elucidation of the law, such as cases involving merely questions of fact, of the existence of fraud, or merely the construction of a will, or whether, in an action for negligence, there was a case for the jury.

Able and enterprising law publishers, writers, and editors have done much to reduce the case law to manageable bulk, and to bring the new cases promptly to the attention of the profession. The well-known reporter system brings to the lawyers of each state the decisions of the highest courts of neighboring states, and thus helps to counteract the tendency of the accumulation of cases to confine their attention to the decisions of their own courts; but the relief attainable by these various experiments is small and temporary. While new encyclopaedias and digests are going through the press, the current of decision is sweeping on, and before the first edition of a new work is finished, a new edition or a supplement must be begun to include the new cases. Law publishers and annotators are less powerful to stop or to confine the course of the common law than Justinian or Napoleon have proved to stop or to confine the course of the Roman or Civil law. It remains for lawyers and judges to devise and adopt some rational method of dealing with the precedents which will prevent their increasing volume from causing danger to the law.

It may be asserted with confidence that the best minds which have labored upon the common law have stood for its unity. In Norrington *v.* Wright, an action by an English merchant against a firm of American merchants upon a contract for the sale and delivery of iron rails, Mr. Justice Gray gave the weight of his name to the statement that "a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind is greatly to be deprecated."[1] If that be so, how much more is diversity in the common law as administered in the different states of the Union to be

[1] 115 U. S. 188. See Sir Frederick Pollock, The Vocation of the Common Law.

deprecated and avoided, if reasonable means can be found to prevent it.

At the outset it is well to remember the fact that the basis of our case law is the common law and equity system of England. Loyalty to the common law is a sentiment which may well inspire the lawyers and law professors and judges of the United States to unite and to labor for uniformity of law. The common law went forth from England with the colonists and made its way in the new world without any adventitious aid. The colonists were not required to adopt it. They were prohibited from making laws repugnant to the laws of England, but subject to that restriction were at liberty to adopt such laws and customs as were suited to their condition. The following statement of Judge Story is generally accepted as a true statement of the common law: "Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." [1] As late as 1810, Thomas Jefferson, in a letter relating to a vacancy in the federal Supreme Court, in reference to the law of the eastern states, said: "The basis of their law is neither common nor civil; it is an original, if any compound can be so called. Its foundation seems to have been laid in the spirit and principles of Jewish law, incorporated with some words and phrases of common law, and an abundance of notions of their own. This makes an amalgam *sui generis;* and it is well known that a man first and thoroughly initiated into the principles of one system of law can never become pure and sound in any other." [2] Jefferson is cited as a keen observer, well informed in regard to conditions in the colonies. There is truth in what he said, and his views are to some extent corroborated in undoubted sources. In the preface to the Records of the Court of Assistants of the Colony of the Massachusetts Bay, the author says: "In its modes of procedure, the Court seems to have been governed by the general principles of the Common Law which the Colonists had brought with them from England; by the habits of legal practice which they had acquired as Englishmen — some of them by special training; by the limitation in the Charter that no laws should be made repugnant to

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[1] Van Ness *v.* Pacard, 2 Pet. (U. S.) 137, 144 (1829).

[2] 9 Ford, Writings of Jefferson, 285, Letter to Gallatin. See also pp. 282–3, in Letter to Madison, and p. 289, Letter to Judge John Tyler.

the laws of England, — as they construed that limitation; and by the guide of those only other sources of law which they recognized, — the Mosaic Code as interpreted by themselves, and the enactments of the General Court from time to time, with the advice sometimes of the Elders of the Churches."[1] A recent writer speaking of the transfer of the common law to the colonies said: "The legal theory of the transfer has its established place in American jurisprudence; but, historically, it should be modified so as to bring out the fact that we had a period of rude, untechnical popular law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law. . . . The theory of the Courts is an incomplete, one-sided statement needing historical modification."[2] With the revolutionary struggle and the growth of national feeling came a growth of legal unity. Blackstone's Commentaries appeared in 1765, and ten years later Burke said in Parliament: "I have been told by an eminent Bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the Law exported to the Plantations. The Colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England."[3] Professor Thayer states the number of copies taken in this country at one thousand.[4] An American reprint of Blackstone appeared in 1771–72, with a list of nearly eight hundred subscribers, printed at the beginning of the fourth volume, and headed by "John Adams, Esq; Barrister at Law, Boston." The list of subscribers contains the names of many merchants, with a good representation of farmers and laymen in various walks of life, in addition to lawyers and judges, and calls for about fourteen hundred copies. There can be little doubt that Blackstone did much to make the common law familiar and popular among the colonists prior to the Declaration of Independence. It was then generally accepted as the common law of the United States, and many of its provisions securing personal liberty to the subject were adopted as Bills of Rights in the various state constitutions. In this way the

[1] 1 Records of the Court of Assistants of the Colony of the Mass. Bay, vii, by John Noble, Esq.

[2] Professor Reinsch, Select Essays in Anglo-Am. Legal History, 367, 370.

[3] Conciliation with America, 1 Payne, Select Works of Burke, 182.

[4] Thayer, Marshall, 6.

common law of England has secured a hold upon the people of the United States which can never be shaken off.[1]

Still more remarkable is the growth of the chancery jurisdiction in the United States.[2] For various reasons courts of equity had great difficulty in gaining a foothold in the colonies. It may well be that as a branch of the prerogative equity was hateful to many of the colonists. In a number of instances enactments establishing courts with equity jurisdiction were passed, but annulled by the action of the government in England. In some instances courts of equity were created by ordinance, conferring the powers of a chancellor upon the governor or his assistants, which provoked the opposition of the popular assemblies and of the people. The result was that equity jurisdiction was conferred only slowly and cautiously upon the courts. In Massachusetts full equity jurisdiction was not granted to the courts until 1877. In Connecticut, for more than a century after the organization of the government, equity jurisdiction was retained and exercised by the General Assembly. In New York a court of chancery was created in 1683 by an act of the Assembly, but the governor and his council refused to concur. "The erecting of a court of chancery, afterwards by an ordinance of the 2nd September, 1701, to consist of the Governor and Council, rendered it extremely unpopular; and frequent but fruitless attempts were made by the Assembly to destroy the court."[3] Chancellor Kent states that when appointed chancellor in 1814, he "took the court as if it had been a new institution and never before known in the United States."[4] In Pennsylvania a

[1] It is worthy of notice that after the Revolution the feeling against England was so strong that some states prohibited the citation of English authorities in the courts. See the New Jersey statute of 1799, cited by Judge Baldwin in Two Centuries' Growth of Am. Law, 1, and found in Patterson, Laws (1800), 435, 436. My friend Judge Swayze of the New Jersey Court of Errors informs me that this law was superseded by a more stringent statute of December 1, 1801, which imposed a penalty upon counsel who disobeyed it (Pamphlet Laws of 1801, 127); but in 1820 the statute of 1801 was repealed. Revision of 1820, 726; Pamphlet Laws of 1820, 126.

[2] In 1 Select Essays in Anglo-Am. Legal History, 366, the reader will find a valuable list of references to authorities on the system of law and equity in the colonies. Good matter will also be found in the following citations: Washburn, Judicial History of Mass.; Parker *v.* Simpson, 180 Mass. 334, opinion by Mr. Justice Hammond; 1 History of Bench and Bar of New York, 69–74; Whittlesey *v.* Hartford, P. & F. R. R. Co., 23 Conn. 421, 430; 1 Root, Reports, XXXIII; Federalist, Nos. 80 and 83, by Hamilton.

[3] See reporter's preface, 1 Johns. Ch. (N. Y.).

[4] Memoirs and Letters of Chancellor Kent, 158. See also 1 Great Am. Lawyers, 435, 444, *et seq.*, sketch of Robert R. Livingston, by James Brown Scott.

court of chancery was created in 1720, but had a brief existence of sixteen years, after which equity was administered for a century through common law forms.[1] In the southern colonies the chancery jurisdiction seems to have caused less friction. The first equity cases reported in America are to be found in a folio volume of decisions by the High Court of Chancery in Virginia, published by Chancellor Wythe in 1795.[2] This was followed by Desaussure's Equity Reports, consisting of three volumes of cases argued and determined in the Court of Chancery of the State of South Carolina from the Revolution to December, 1813. They were published in 1817, while the first volume of Johnson's Chancery, New York, containing the cases from March, 1814, to December, 1815, was published in 1816. In view of the condition of equity jurisdiction in the state courts in 1789, it was fortunate and very remarkable that the federal Constitution extended the judicial power of the new government to all cases "at law and in equity," arising under the Constitution and laws of the United States.[3] Under this grant of power and the legislation of Congress, beginning with the Federal Judiciary Act, a uniform system of equity law and practice was secured to the country in the federal courts. "Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts."[4] This great jurisdiction has been a powerful influence in the past and is likely to be more potent in the future on the side of uniformity of law. One method of its operation in the past may be seen in the following language of Campbell, J., in declaring a state statute unconstitutional which assumed to provide for a final decision of questions of fact in chancery suits by the verdict of a jury. "As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as

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[1] 1 L. Quar. Rev. 455, article by Sydney G. Fisher, The Administration of Equity through Common Law Forms. See p. 457.

[2] Soule, Reference Manual, 61, n. 9.

[3] The words "cases in law and equity" were inserted in the draft prepared by the Committee of Detail, on motion of Johnson of Connecticut, apparently without debate. See Bancroft, Formation of the Constitution, B. III, c. X; Gilpin, 1438, 1439. The reader will find some reference to Johnson of Connecticut in 1 Great Am. Lawyers, 320, sketch of Oliver Ellsworth, by Frank Gaylord Cook.

[4] Mississippi Mills *v.* Cohn, 150 U. S. 202, 205 (1893).

involving the necessity of separate administration in important particulars." [1]

English common law and equity being the basis of much of our case law, it is manifest that English precedents cannot safely be ignored by American lawyers and judges. Where a rule of English common law or equity has been adopted by the courts as a part of our law, the duty would seem to be clear to endeavor to discover the true ground and scope of the rule, and to apply it logically to all concrete cases. The same applies to all rules of law, whatever their origin. In our system every case decided by a court has a twofold office. In the first place, it is an exercise of public powers by a court or magistrate charged with the duty of administering public justice, and puts an end to the controversy between the parties. In that aspect the case is of interest only to the parties. In the second place, under our law, the case is a precedent, binding upon all inferior courts and not to be departed from by the court which decided it except upon very cogent reasons. As a precedent, the important questions are, what did the case decide and what were the precise grounds of decision? The reason of the decision is the vital question to one who is seeking to master the science of law, or to one who is seeking light to enable him to decide correctly another concrete case. As a precedent, the case is nothing but an illustration of the application of a principle to concrete facts. It is valuable for its reasoning, and for little else. Such is the view of Lord Mansfield,[2] which seems to be countenanced by Mr. Justice Holmes, when he says that it is a mistake to be frightened at the increase of reports. Professor Langdell held the same view, and taught the same doctrine. He said that much the shortest and best, if not the only effective way of mastering legal doctrine was by studying the cases in which it is embodied. "But," he adds, "the cases that are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study." [3] One practical problem, then, in dealing with the precedents is to evolve some principle of selection by which the cases that are useful as precedents may be separated from those which are useless to all

[1] Brown *v.* Buck, Circuit Judge, 75 Mich. 274, 277 (1889).

[2] See Rex *v.* Bembridge, 3 Dougl. 327, 332 (1783), cited in Dill., Laws and Jurisp. of England and America, 182.

[3] Langdell, Cas. on Contracts, 2 ed., VIII.

but the parties. This ought not to be done or to be attempted by an exercise of legislative power, such as the periodical revision and consolidation of the statutes, which takes place in most of the states, but should be brought about by a process of natural development, by common consent, through the competition of different methods of dealing with the subject. Out of the many collections of cases by learned law professors for the use of students of law, or by legal writers for general use, some may gain authority and credit by their conceded superiority, and be accepted as containing all the cases that are useful for general study upon the subject to which they relate. Just as Littleton's Tenures and Blackstone's Commentaries have attained the rank of classics among text-books, and acquired almost unquestioned authority in the historical development of the law, under the new method of study by cases it seems not impossible that some collections of cases may attain similar rank.

The great and controlling question, however, is not what cases, out of the mass of reported decisions, shall be accepted as authority, but in what manner the cases shall be studied and used. If they are habitually studied and used by the courts and the bar as illustrations, and valuable only for the principles embodied and applied in them, little danger will result from the increase in their number. In fact that is the way the cases have always been dealt with by the great common law lawyers. They reason from principle, and as a rule neither need nor cite many cases. The time has come when this course must be adopted more generally and applied more vigorously if the law is not to be lost in the mere accumulation of cases. If the cases were so dealt with, it is not contended that differences in the common law of the several states would disappear, but uniformity of the common law would be preserved to a far greater extent than at present, and new diversities would be less likely to arise in the future. "One mark of a great lawyer is that he sees the application of the broadest rules."[1] The persistent and faithful study of those cases which may be called the fountains of the law, to discover their reason, develops the faculty of seeing the application of the broadest rules, tends strongly toward uniformity of law when the rules are steadily and logically applied by lawyers and judges in the daily administration of the law, and is the best safeguard now available against the

[1] O. W. Holmes in 10 HARV. L. REV. 474.

dangers resulting from the accumulation of case law. The maxim which Sir Edward Coke and Professor Langdell united in indorsing has acquired new force and meaning: *Melius est petere fontes quam sectari rivulos.*

Before proceeding further to consider the efficacy of this method of dealing with the precedents, it will be useful to consider the results which have followed in a conspicuous case where the court failed to adhere to principle. In Lawrence *v.* Fox[1] the plaintiff brought an action of contract supported by the following evidence: *viz.*, "that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day." The court overruled a motion by the defendant for a nonsuit and submitted the case to the jury, who returned a verdict for the plaintiff. The case was taken to the Court of Appeals, and there argued upon three points: first, that there was no competent evidence that Holly was indebted to the plaintiff; second, that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration; and third, that there was no privity between the plaintiff and the defendant. The court, by Hiram Gray, J., sustained the action, and concluded its discussion of the third point with these words: "if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result, (which I by no means concede) the effort should not be made in the face of manifest justice."[2] The majority of the court also relied on precedents. Gray, J., said: "As early as 1806 it was announced by the Supreme Court of this state, upon what was then regarded as the settled law of England, 'that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it.' Schermerhorn *v.* Vanderheyden (1 Johns. 140) has often been reasserted by our courts and never departed from." Schermerhorn *v.* Vanderheyden is a *per curiam* opinion based on Dutton *v.* Poole[3] and some other citations, wholly inconsistent with principles of contract and consideration thoroughly established in the common law when Lawrence *v.* Fox was decided. Johnson, Ch. J., and Denio, J., were of

[1] 20 N. Y. 268 (1859). [2] 20 N. Y. 275. [3] 1 Vent. 318.

opinion that the promise of Fox was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge though taken without his being privy thereto. Comstock, J., delivered a vigorous dissenting opinion, beginning with the statement: "The plaintiff had nothing to do with the promise on which he brought this action."[1]

Turning to Langdell's Summary of Contracts, the rule is thus stated:

"It was decided in Dutton *v.* Poole[2] (1677), that a daughter might maintain an action on a promise made to the father for her benefit, though it had previously been decided (Bourne *v.* Mason) as it has been since (and uniformly in England, Crow *v.* Rogers, Price *v.* Easton) that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise. This latter proposition is so plain upon its face, that it is difficult to make it plainer by argument. A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise. In the case of a promise made to one person for the benefit of another, there is no doubt that the promisee can maintain an action not only in his own name, but for his own benefit. If, therefore, the person for whose benefit the promise was made could also sue upon it, the consequence would be that the promisor would be liable to two actions. In truth, a binding promise to A to pay $100 to B confers no right upon B in law or equity. It confers an authority upon the promisor to pay the money to B, but that authority may be revoked by A at any moment. Of course it follows that the distinction upon which Dutton *v.* Poole was decided is untenable; and accordingly that case has been overruled. Tweddle *v.* Atkinson."

Has this statement of the case against allowing a stranger to a contract to bring an action upon it ever been met by any court which has allowed the action? Mr. Lawrence had no right, either legal or equitable, under the contract between Fox and Holly. If they had desired to confer a right upon him, the law provided a variety of methods by which it could be done. It was competent for Holly to act as agent for Lawrence in making the contract, if he had chosen to do so, and then upon familiar principles of agency Lawrence could ratify the act of one who had assumed to be his

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[1] 20 N. Y. 275.

[2] Langdell, Summary of Contracts, 2 ed., § 62.

agent. It was competent for Holly to make a declaration of trust in regard to the promise of Fox, in favor of Lawrence; or to require an undertaking from Fox that he would pay to Lawrence the specific fund of $300 delivered to him, thereby impressing upon it a trust; or for all three parties to effect a novation by making the promise necessary to extinguish the debt from Holly to Lawrence, and substitute for it a new debt or obligation from Fox to Lawrence. They did none of these things, and upon the facts proved it cannot be argued in support of the decision that they attempted to do any of these things. If the law provided no reasonable means by which Lawrence could acquire a right against Fox upon the transaction described, there might be ground for straining to extend him a remedy; but with ample means existing in the law to create a right in his favor, which was not used in his behalf, why should the court trouble itself to give Mr. Lawrence a remedy when he had no right?

The subsequent history of the case of Lawrence *v.* Fox is full of interest. Any student of the law will be well repaid for his labor, by reading all the subsequent decisions of the Court of Appeals in which the case has been cited and considered. Most students I believe will rise from that labor with the conviction that it would have been better for the law if Mr. Lawrence had been denied a remedy. It is plain that the Court of Appeals itself has not been satisfied with the decision. In Pardee *v.* Treat, Andrews, J., says: "The recent cases show that the court is disinclined to extend the rule in Lawrence *v.* Fox."[1] In Wheat *v.* Rice, Finch, J., says: "We prefer to restrict the doctrine of Lawrence *v.* Fox within the precise limits of its original application."[2] And again, in Gifford *v.* Corrigan: "Of course, it is difficult, if not impossible, to reason about it without recurring to Lawrence *v.* Fox (20 N. Y. 268) and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case vested the creditor's right upon

[1] 82 N. Y. 385 (1880).

[2] 97 N. Y. 296, 302 (1884).

the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract or its consideration."[1] Space will not here permit the pursuit of Lawrence *v.* Fox through all the refinements and distinctions which it has engendered, but there is good reason for the assertion that it has brought some confusion and uncertainty into the law. Harriman on Contracts says: "This rule has no foundation in principle, and is a pure case of judicial legislation; but the rule has been widely adopted throughout the United States, and has led to great confusion in the law."[2] A graduate of the Harvard Law School, writing as a practicing lawyer in New York, says: "The New York courts, however, were soon put on the defensive, and, pitifully and apologetically squirming and shifting under the heavy burden, began to limit the new rule and hem it about. . . . We find a never-ceasing pricking of conscience."[3] In Wald's Pollock on Contracts, Professor Williston says: "The law of New York is in rather dubious condition. It has been laid down in some cases that in order to entitle one who is not a party to a contract to sue upon it, the promisee must owe him some duty; but from recent cases it seems that a moral duty is enough, and this gives the court considerable latitude."[4]

In the face of comments like these, and others which may be made, equally well founded, it is of little value to say that the doctrine of Lawrence *v.* Fox has spread far and wide in the United States, and that Massachusetts is now the only state which adheres to the general rule that a third person cannot sue upon a contract made for his benefit. If the lawyers and judges of Massachusetts have been remiss in the pursuit of "manifest justice," they have the satisfaction of seeing the Supreme Judicial Court sailing over untroubled seas in the law of contracts, under the friendly light of the common law, while the highest courts of sister states are struggling among the rocks and shoals to which they have been guided by the false light of Lawrence *v.* Fox. The more serious matter to be considered is that, in departing from the sound principles of the common law upon this important subject, many courts have become involved in diversity and uncertainty due to a failure to perceive or to state clearly any logical ground upon which the de-

[1] 17 N. Y. 257, 263 (1889).

[2] Harriman, Contracts, 2 ed., 213.

[3] 1 HARV. L. REV. 226, Privity of Contract, by Jesse W. Lilienthal.

[4] Wald's Pollock, Contracts, 250.

parture from sound principle was based. When the action of the courts leads to contradictory decisions or to uncertainty in the common law, relief must be had from some quarter, and the only available source of relief is the legislature. It cannot be said in all cases that it is undesirable that the legislature should be invoked to enact laws affecting the common law as declared by the courts. Such legislation at times is necessary and proper as a result of industrial or economic or social changes in society. Thus the rule established in the case of Farwell *v.* Boston & Worcester Railroad,[1] by which a master was not answerable to his servant for injuries received in consequence of the negligence of a fellow servant, after a career of nearly half a century, has been profoundly modified by the Employers' Liability Act, and in England by the Workmen's Compensation Act — legislation which may well be justified on the ground that the rule of the common law established before 1850 was unsuitable to the great industries and changed conditions of the present day. The law of contracts, the law of torts, the law relating to personal property, and the entire system of equity may be said to be the work of the courts, and but slightly influenced by legislation. As a general rule it is better that the evolution of the law in those important subjects should continue through the agency of the courts rather than of the legislature; and it may further be said that it is highly undesirable that the need for legislation on those subjects should result from unsound or illogical action by the courts themselves. This is one of the evils resulting from Lawrence *v.* Fox. Thus Mr. Lilienthal suggested, in the article above cited, " Perhaps we shall get relief from the Field Code, which begins to loom up with terrible distinctness, and already poses as the layman's panacea and the lawyer's dragon."[2]

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[*To be continued.*]

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[1] 4 Met. (Mass.) 49 (1842).

[2] 1 HARV. L. REV. 232.